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IN THE

Supreme Court of the United States

October Term, 1973.

No. 73-693.

COMMONWEALTH OF PENNSYLVANIA and BUCKS COUNTY INTERFAITH HOUSING CORPORATION, a Non-Profit Corporation, SUSAN CUMMINGS, RAMONA MORALES SERRANO, JEANNE COTTON, PEDRO ORTIZ, OLIVIA MOFFIT, Individually and on Behalf of Others Similarly Situated,

Petitioners,

v.

COUNTY OF BUCKS and BUCKS COUNTY PLANNING COMMISSION and BUCKS COUNTY HOUSING AUTHORITY and All of the Municipalities of Bucks County (Individually Named in Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania),

Respondents.

On Writ of Certiorari to the Supreme Court of Pennsylvania.

BRIEF FOR RESPONDENTS BUCKS COUNTY HOUSING AUTHORITY, BRISTOL BOROUGH, LANGHORNE MANOR BOROUGH AND LOWER MAKEFIELD TOWNSHIP.

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STATEMENT OF THE CASE.

Bucks County Housing Authority, Bristol Borough, Langhorne Manor Borough and Lower Makefield Township (being four of the fifty-six defendants named in this action) accept the petitioners' statement of the case except for what we feel are the following inaccuracies:

1. We do not agree that the Court of Common Pleas of Bucks County, Pennsylvania, held that the petitioners, as non-residents or non-landowners of the municipalities "did not have standing to challenge the invalidity of the zoning ordinances and practices". In our judgment, we believe that the Pennsylvania courts did not reach the question of petitioners' standing but held that the suit:

   a. was premature;

   b. sought a hypothetical opinion on constitutional issues;

   c. failed to follow statutory procedures under the Pennsylvania Municipalities Planning Code; and

   d. presented a non-justiciable controversy because of the "unparticularized context" of the form of the action, the multiplicity of defendants and the lack of judicially manageable standards for resolving the question in its present context.

2. The petitioners' complaint was dismissed by the Pennsylvania courts on questions of Pennsylvania statutory procedure.

ARGUMENT.

The Pennsylvania Courts Have Not Decided a Federal Question of Substance and the Petition for Certiorari Should Be Denied.

As Respondents in this Petition for Writ of Certiorari, we contend that no Federal question of substance was determined by the Pennsylvania courts in this action. The case was decided under well settled principles of Pennsylvania statutory procedures. The lower courts did not reach the constitutional questions raised herein since such questions have been raised herein in a purely hypothetical context.

In this suit, the Commonwealth of Pennsylvania, two non-profit housing corporations and thirteen individuals, on behalf of themselves and a class of others similarly situated, by a Complaint in Equity (instead of by applications to the appropriate municipal officers) have sought to invalidate the fifty-four separate zoning ordinances of all of the municipalities of Bucks County, Pennsylvania, on the grounds of alleged unconstitutional exclusion of low and middle income blacks and Spanish-speaking persons.

The trial court sustained Preliminary Objections (in the nature of demurrers) to the Complaint and declined to exercise equitable jurisdiction inter alia on the grounds that:

(a) The petitioners failed to follow the statutory remedies and procedures available under the Pennsylvania Municipalities Planning Code (Petition for Certiorari, Appendix C, page A9);

(b) The petitioners' action was premature and sought an advisory adjudication on hypothetical facts (Petition for Certiorari, Appendix C, pages A10 to A13);

(c) To the extent that affirmative relief was requested, the court did not have power to supervise directly the legislative and advisory planning functions of at least fifty-five local governmental agencies (Petition for Certiorari, Appendix C, pages A13 to A15); and

(d) The petitioners' action was not justiciable in its present form in that the form in which the action was brought afforded the court no "judicially discoverable and manageable standards" for resolving the problem (Petition for Certiorari, Appendix C, pages A15 to A19).

We do not believe that this action presents a Federal question of substance within the meaning of Supreme Court Rule 19.1(a) or that any question in this case raises any special or important reasons for the granting of a writ of certiorari. As we view the decisions of the Pennsylvania courts in this case, all that was really decided herein was a narrow question of Pennsylvania procedure.

On behalf of the four respondents which we represent, we concede that petitioners have "standing" to attack discriminatory zoning ordinances. We also concede that exclusionary zoning is unconstitutional as an abstract principle.

The Pennsylvania courts have been vigilant in protecting the rights of their citizens in zoning matters and have had no hesitancy in invalidating offending ordinances when particular uses are totally banned from any municipality and when questions of discriminatory exclusion have been raised in actual cases or controversies involving specific factual situations. *See,* e.g. *National Land and Investment Company v. Easttown Township Board of Adjustment,* 419 Pa. 504, 215 A. 2d 597 (1965) (four acre lot minimum); *Girsh Appeal,* 437 Pa. 237, 263 A. 2d 395 (1970) (exclusion

of apartments); *Concord Township Appeal,* 439 Pa. 466, 268 A. 2d 765 (1970) (two acre lot minimum); *Exton Quarries, Inc. v. Zoning Board of Adjustment,* 425 Pa. 43, 228 A. 2d 169 (1967) (exclusion of quarries); *Casey v. Zoning Hearing Board,* 8 Pa. Commonwealth Ct. 473, 303 A. 2d 535 (1973) (exclusion of apartments); *Beaver Gas Company v. Osborne Borough,* 445 Pa. 571, 285 A. 2d 501 (1971) (exclusion of service stations); *Shomo v. Derry Borough,* 5 Pa. Commonwealth Ct. 216, 289 A. 2d 513 (1972) (exclusion of mobile homes); *Daikeler v. Zoning Board of Montgomery Township,* 1 Pa. Commonwealth Ct. 445, 275 A. 2d 696 (1971) (exclusion of advertising signs); and *Delaware Institution District v. Middletown Township,* 6 Pa. Commonwealth Ct. 146, 293 A. 2d 885 (1972) (public geriatric center). The invalidity of exclusionary zoning in Pennsylvania is now settled law.

Petitioners have failed to mention in their Petition for Writ of Certiorari that two of the petitioners, *Bucks County Interfaith Housing Corporation* and *Suburban Action Institute,* both averred that they were "ready, willing and able" to build low-income housing in Bucks County, but did not aver that they were seeking judicial relief as to any specific municipal ordinances or sections thereof. (*See* our Appendix A, paragraphs 5, 6 and 133). As such entities, they should be perfectly capable of applying for specific sites and testing the alleged unconstitutionality of any one of the fifty-three zoning ordinances in the normal manner.

Pennsylvania law provides for a complete procedure to attack the validity of any zoning ordinance by anyone aggrieved by its provisions and this remedy is available to the corporate petitioners by making an application for approval of a specific housing project in any one of the defendant municipalities. As the lower court found:

> ". . . the statutory remedies and methods of procedure to raise questions of interpretation, application and

validity of zoning ordinances are exclusive and must be strictly pursued . . ." (Petitioners' Appendix C, page A9)

And also, at Petitioners' Appendix C, page A10:

"Any cause of action which they *in the future* may be thought to have, if and when they ultimately do present a concrete and subsisting factual situation which would be ripe for judicial determination, is not *presently* available to them even assuming the merit of their position on the academic, constitutional and other legal propositions for which they contend.

"In reality, plaintiffs seek a premature and merely advisory opinion or adjudication of the theoretical or abstract invalidity of the various zoning ordinances, as they might relate to persons of the classes they purport to represent, if and when such persons should take actual steps to procure low and moderate cost housing in Bucks County. The rendering of advisory opinions on hypothetical facts is no part of the judicial function . . ." (Emphasis in original).

In our view, the question in this case is substantially similar to the problem presented in *Socialist Labor Party v. Gilligan,* 406 U. S. 583, 92 S. Ct. 1716, 32 L. Ed. 2d 317 (1972). (Appeal from three judge court dismissed.) In that case, the Socialist Labor Party had sought to attack the loyalty oath provisions of the Ohio Election Code, but the impact of such provisions upon the plaintiffs had not been established by the pleadings. Under the circumstances, the court, speaking through Mr. Justice Rehnquist held that although the plaintiffs might meet the technical requirement of "standing," their case had not raised with any particularity the effect on them of Ohio's affidavit requirement. As the court stated:

> "This Court has recognized in the past that even when jurisdiction exists it should not be exercised unless the case 'tenders the underlying constitutional issues in clean-cut and concrete form.' *Rescue Army v. Municipal Court,* 331 U. S. 549, 584, 67 S. Ct. 1409, 1427, 91 L. Ed. 1666 (1947). Problems of prematurity and abstractness may well present 'insuperable obstacles' to the exercise of the Court's jurisdiction, even though that jurisdiction is technically present."

We will not repeat here at length the long history of Pennsylvania decisions which have held that questions concerning the constitutional validity of municipal zoning ordinances are properly brought under the statutory procedures available under the zoning enabling acts rather than through actions in equity. These cases are reviewed in the opinion of President Judge Satterthwaite for the Common Pleas Court at pages A9 through A13 of Petitioners' Petition for Writ of Certiorari, Appendix C.

The Pennsylvania principles of pleading procedure and jurisdiction of equity courts which resulted in the dismissal of *this particular suit* against the municipal defendants do not prohibit petitioners from bringing an action in the future to contest the validity of any one of the ordinances under an *actual case and controversy* should the need arise. But when any potential constitutional question which might be raised by petitioners is so inter-related with state statutory questions of pleadings, the appropriateness of the forum, and the form of the action, the constitutionality of which are not in issue, the exercise of certiorari jurisdiction by your honorable Court is not warranted. *Compare Duncan v. Tennessee,* 404 U. S. 821, 92 S. Ct. 121, 30 L. Ed. 2d 49 (1971) (certiorari granted), 405 U. S. 127, 92 S. Ct. 785, 31 L. Ed. 2d 86 (1972) (writ dismissed).

CONCLUSION.

Respondents respectfully request that the Court enter its order denying the Petition for Writ of Certiorari to the Supreme Court of Pennsylvania.

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APPENDIX A.

Paragraphs of Complaint.

5. Plaintiff Bucks County Interfaith Housing Corporation is a non-profit housing development corporation having its principal office at 32 North Broad Street, Doylestown, Bucks County, Pennsylvania, incorporated under the laws of the Commonwealth for the purpose of sponsoring, developing, and building low-income and moderate-income housing, and said Plaintiff is ready, willing, qualified and able to build such housing in Bucks County, but is unable to do so for the reasons set forth hereinafter.

6. Plaintiff Suburban Action Institute is a non-profit charitable trust organized under the laws of the State of New York, having its principal office at 180 West Post Road, White Plains, New York, which, with its subsidiary non-profit development corporations, sponsors, develops and builds low-income and moderate-income housing, and said Plaintiff is ready, willing, qualified and able to build such housing in Bucks County, but is unable to do so for the reasons set forth hereinafter.

133. Plaintiff Corporations are ready, willing and able to construct low-income and moderate-income housing in the County and would proceed to purchase and develop sites suitable for such purposes if the discriminatory aspects of the present practices and procedures of the Defendants were eliminated, and unless there is jurisdiction in equity, a multiplicity of suits will have to be filed in the future for the causes of action set forth herein and for each and every project in each municipality.